

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

MILEPOST TRANSPORTATION, INC.<sup>1</sup>

Employer

and

LOCAL UNION NO. 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

Case 13-RC-20209

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>3</sup>

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:<sup>4</sup>

All full time and regular part time road drivers employed by the Employer at its facility currently located at BNSF Railroad at 5601 West 26th Street, Cicero, Illinois, excluding all mechanics, dispatchers, office clerical employees and guards, professional employees and supervisors as defined in the Act and other employees.

**DIRECTION OF ELECTION\***

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Local Union NO. 710, International Brotherhood of Teamsters, AFL-CIO

### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of the full names of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before October 29, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by **November 5, 1999**.

**DATED October 22, 1999** at Chicago, Illinois.

/s/ Harvey A. Roth  
Acting Regional Director, Region 13

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- \*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:
- (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.
  - (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
  - (c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

- 1/ The names of the parties appear as amended at the hearing.
- 2/ The arguments advanced by the parties at the hearing have been carefully considered.
- 3/ Milepost Transportation, Inc., an Illinois corporation, is engaged in the transport of railroad and airline personnel for air carriers and rail carriers; during the next projected fiscal year, a representative period, the employer will derive gross revenues in excess of \$500,000; during the same period of time the employer will purchase and receive goods, products and materials valued in excess of \$50,000 directly from points located outside the State of Illinois.

The sole issue presented at the hearing is whether Milepost Transportation, Inc., (“Milepost” or “the Employer”) is subject the jurisdiction of the National Labor Relations Act.

### **FACTS**

The Employer, located in Cicero, Illinois, provides transportation services for personnel of Burlington Northern/Santa Fe Railroad (“BNSF”), and Norfolk Southern/Conrail (“NSC”), collectively called “Railroad.” Milepost utilizes passenger vans to transport railroad crews over the road between various points. The type of personnel Milepost transports includes the following: engineers, brakemen, road foremen, flagmen, and trainmasters. Essentially, Milepost transports individuals necessary for the operation of a train. Milepost drives the above-mentioned individuals to and from various locations along the rail line, or to and from the rail line to other locations. For example, on any given day, Milepost may pick up a “crew” from a hotel, and drive them 100 miles to a point on the rail line to intercept and relieve another “crew”. After dropping off the relief crew, they may conceivably be asked to transport the crew that was just relieved back to their homes or other destination.

The operation at issue in the instant petition is located at 5601 West 26<sup>th</sup> Street, Cicero, Illinois (“facility”). Milepost, at no charge, occupies 550 square feet of space inside of a three-story building; two other contractors also use space within the facility. BNSF, however, occupies a majority of the building at the facility. As such, BNSF pays for all utilities for the structure at 5601 West 26<sup>th</sup> Street. In addition, Milepost’s telephone system is part of or related to BNSF’s internal telephone network. The parking lot at the facility is shared by visitors, BNSF employees, Milepost transport vans, BNSF vehicles, and Milepost employees.

Milepost has independent relationships with BNSF and NSC, evidenced by the separate contracts with each of the companies. In exchange for a fee, each contract vests Milepost with the authority to organize, and operate, at Milepost’s sole cost and responsibility, transportation services for the Railroad. The contracts specify guidelines that Milepost must honor, but the contracts specifically divest themselves from control of the operations, deferring instead to Milepost.

Milepost owns, maintains and operates its fleet of transport vans without assistance from the Railroad. Milepost pays for the insurance, fuel, license fees, taxes, and for the maintenance of the fleet. In addition, the contracts specify that Milepost purchase and maintain an appropriate radio with the capability to monitor train frequencies.

Milepost has the authority to screen, hire, train, discipline and terminate individuals. The Railroad, however, has placed slight parameters in the contract that Milepost must adhere to with respect to driver qualifications. Thus, for example, Milepost drivers must be licensed, competent, and undergo a drug test. Milepost administers compensation and benefits wholly independent of the Railroad. The Railroad specifically asserts that Milepost remains responsible for maintaining its own work force, and for hiring and maintaining competent individuals.

The Railroad provides Milepost with suggested driving routes they feel are the most direct. Milepost drivers are expected to follow said routes. The Railroad and Milepost maintain the reciprocal right to refuse service on a specific transport. For example, if a crew feels their Milepost driver is operating erratically, or appears to be under the influence, they can ask the driver to pull over and call for a new driver. Conversely, if a driver feels a crewmember is jeopardizing the safety of the transport-- by refusing

to wear a seat belt for example-- the driver can call dispatch. Dispatch in turn contacts the railroad crew supervisor, who then contacts the van, and deals with the recalcitrant crewmember.

Robert McClure, operations manager of Milepost's Cicero operation, meets at least 3 times weekly with the assistant superintendent, administrative vice president and division superintendent of BNSF. At those meetings, they discuss how Milepost's operations are going; future events; whether more employees or vehicles are necessary to cover upcoming heavy periods; and to deal with complaints or issues that either BNSF crews or Milepost employees may have encountered during transport.

If the Railroad makes a complaint against one of the Milepost drivers, Milepost will investigate the allegation and determine a result. After such investigation, Milepost will then report the result to the Railroad. Milepost adds that on occasion the Railroad has stated that they no longer want an individual on their property; and in those instances Milepost has terminated the individual. The evidence, however, did not foreclose the possibility that such an employee may be transferred to another Milepost location. Along with the scheduled weekly meetings, the Railroad often faxes other complaints which Milepost addresses immediately by investigating or scheduling a meeting with the Railroad.

The relationship between the Railroad and Milepost is contractual. The contracts provide for an indemnity clause that relieves the Railroad of any liability incurred by Milepost. In addition, both contracts provide a reciprocal cancellation clause, requiring only 30 days notice. The essence of the contracts requires Milepost to provide a service and be subject to any and all issues that arise from providing such service. In exchange, the Railroad financially remunerates Milepost for the service.

Milepost does not believe that it is subject to the jurisdiction of the NLRA. It believes that it is subject to the Railway Labor Act (RLA), due to its intertwined relationship with the Railroad. Further, it believes that they have raised an arguable issue as to jurisdiction, and as such, the Region must refer the case to the National Mediation Board (NMB) for an opinion on whether the NMB would assert jurisdiction. The Petitioner contends that Milepost is separate and apart from the Railroad, and its representation petition should be processed under the applicable rules of the Board.

#### ANAYLSIS

At issue is whether Milepost is controlled directly or indirectly by a railroad, and thus not subject to the NLRA. Milepost is neither directly or indirectly owned nor controlled by the Railroad, and thus is subject to the jurisdiction of the National Labor Relations Act.

The starting point in the analysis must be to view the relevant statutory language. Section 2(2) of the National Labor Relations Act provides that an "employer" shall not include "any person subject to the Railway Labor Act." The Act also provides that the term "employee" cannot include "any individual employed by an employer subject to the Railway Labor Act. The RLA applies to rail carriers:

Sec. 1 first of the RLA provides, inter alia, as follows: The term carrier includes any express company... any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. *Railway Labor Act* 45 U.S.C., §151.

The Board has followed a general practice of referring cases to the NMB when a party raises a claim of arguable RLA jurisdiction. *United Parcel Service*, 318 NLRB 778 (1995), *enfd.* 92 F.3d 1221 (D.C. Cir. 1996). When a case is referred to the NMB, the NMB applies a two-part test to determine the appropriate jurisdiction. *Id.* at fn. 7. First, it determines whether the nature of the work performed is that traditionally performed by employees of rail or air carriers. *Id.* Second, the NMB determines whether a common carrier or carriers exercise direct or indirect ownership or control of the employer. *Id.* Both parts must be satisfied for the NMB to assert jurisdiction. *Id.* However, when it is clear that an employer is

subject to the NLRA, there is no statutory requirement to refer the case to the NMB. *Federal Express Corp.*, 317 NLRB 1155, fn. 5 (1995); *Dobbs Houses, Inc. v. NLRB* 443 F.2d 1066 (6<sup>th</sup> Cir. 1971).

The determination in *D & T Limousine Co.*, 207 NLRB 121 (1973), helps elucidate the instant matter. In that case, the Board referred the case to the NMB for review, because D & T Co. raised an arguable claim of RLA jurisdiction. *Id.* D & T's claim was based on the following: it existed solely to furnish transportation services for Penn Central Railroad; D & T's employees spent all of their working time within the railroad yard; Penn Central had the authority to effectively demand that D & T terminate objectionable employees; and the employees were under the continuous control of the railroad. *Id.* Further evidence in that case showed that the Penn Central did not own or control the operation, and that employees are hired, fired, directed, compensated, and disciplined by D & T, and not Penn Central. *Id.* In addition, the evidence showed that the parties established a contractual relationship where D & T provided transportation services-- which it was wholly responsible for-- and in exchange Penn paid it for its services. *Id.* The NMB found that D & T did not have the elements necessary for RLA jurisdiction, thus finding NLRA jurisdiction appropriate. *Id.* (See also, *D & T Limousine Service*, 320 NLRB 859 (1996), where D & T again raised a claim of RLA jurisdiction; the Board did not refer the question to the NMB since the jurisdictional claims and factual situations in the case were similar to those where the NMB has previously declined jurisdiction, and noted that where jurisdiction has been exercised in the past, it will not refer a case to the NMB unless the employer can establish that its operations have undergone a jurisdictional significant change.)

The evidence in this case mirrors the facts of the *D & T Limousine* cases. Like *D & T*, in the 1973 case, Milepost has established a contract to service the Railroad exclusively. Moreover, the fact that Milepost has separate contracts with different rail companies makes the relationship almost identical to the status of *D & T* in the 1996 case. Similar to the *D & T* cases, the present contracts between Milepost and the Railroad, contain the same type of provisions, including: Milepost's responsibility in providing a fleet of trucks; that the Railroad is not responsible for compensating employees; that the drivers are not under the direction of the Railroad; that the contract holds the Railroad free from liability arising under the employer's performance of the contract; and that the Railroad requests that the employer provide and maintain a two way radio with the ability to monitor the Railroad frequency. Clearly, only one conclusion can be made based on the similarities of the present case to the *D & T* cases - that Milestone, like *D & T*, is subject to the jurisdiction of the Board rather than the NMB.

Milepost points to the fact that it is housed rent-free in the same facility as the Railroad, and that it shares a parking lot, and phone service, as critical elements in the decision. Those facts alone are not dispositive of NLRB jurisdiction. Instead, one can assume that the Railroad's interest in keeping its transportation provider near the heart of its operation only serves the Railroad's interest in making sure that transportation is always available. Surely, the Railroad did not envision making Milepost part of its "family" by inviting it into its house. No, more appropriately, by stating the relationship clearly and unequivocally in their contract, the Railroad put Milepost on notice that its only role in the operation was that of a paid service provider.

Milepost's reliance on *Servicemaster Aviation Services and Allied Services Division, Transportation Communications International Union*, 325 NLRB No. 151 (1998), is misplaced. In that case, American Airlines (American), contracted ServiceMaster Aviation (SAS) to provide it with skycap and related services. *Id.* Unlike the instant case, American exercised extensive control over almost all aspects of SAS's operation. *Id.* American even provided job descriptions and training programs for SAS employees to follow. *Id.* In the present matter, Milepost trains its own employees without any true guidance from the Railroad. In addition, in *Servicemaster*, SAS had to submit all applicant information for American's approval. *Id.* Whereas, Milepost has complete autonomy in the decision making process of hiring its employees. In the *Servicemaster* case, American clearly held control over employees as evidenced by the following: if the contractual relationship was severed, American retained control of all SAS's personnel records; American determined the staffing level and scheduling of SAS employees; American required SAS employees to comply with all American employee work rules; American routinely evaluated SAS employees; American had the unfettered right to terminate any SAS employee; American "held out" SAS employees as their own, by virtue of making them wear American uniforms; American

provided all equipment to SAS employees to perform their jobs. *Id.* The above mentioned list serves to underscore the absolute differences between the *Servicemaster* case, and the present one. The *Servicemaster* case is factually incongruous with the facts of this case. The existence of contractual relationships between the involved Employers and entities subject to the jurisdiction of the NMB is the only similarity between the instant case and *Servicemaster*; however, this dim similarity is eclipsed by the bright line differences between the terms of the contract in the cases.

In sum, Milepost has not established an arguable claim of RLA jurisdiction. The NLRA's jurisdiction over Milepost is clear, and as such, the Board is not required to refer the question to the NMB. Based on the above, I find that the Employer is subject to NLRB jurisdiction, and that it is appropriate for Board to proceed with an election in the unit stipulated to be appropriate.

4/ The parties stipulated as to the unit description. Based upon the parties stipulation and the entire record herein, I find the following to be an appropriate unit for collective bargaining: All full time and regular part time road drivers employed by the Employer at its facility currently located at BNSF Railroad at 5601 West 26th Street, Cicero, Illinois, excluding all mechanics, dispatchers, office clerical employees and guards, professional employees and supervisors as defined in the Act and other employees.

There are approximately 84 employees in the unit found appropriate.

177-1683-7500

Milepost Transportation, Inc.  
13-RC-20209

CHIPS Form 110  
revised 7/31/85

Routing: Bd. Agent (drafter)  
ARD (Reviewing sup.)  
ARD Secretary  
CHIPS  
ARD Secy. (DW file)

110 = REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION  
(Includes 8(b)(7)(C) cases and Decision granting AC, UC, or UD)

Case Number 13-**RC-20209**

Employer's Name **Milepost** Transportation, Inc.

Date of Decision October 22, 1999

Was issuance of decision delayed by concurrent C case? ☐ Yes ☐ No

If yes, enter Case Number 13-**Error! Reference source not found.**

Hearing closed date October 7, 1999

Unit description code:

- ☐ A = overall industrial plus any other classification
- ☐ C = craft, one or more
- ☐ D = departmental, one or more
- ☐ G = guards
- ☐ W = office, clerical, sales & other white collar workers
- ☐ P = professional and/or technical employees
- ☐ R = combination of W & P
- ☐ T = Teamsters (only when petitioner is Teamsters)
- ☐ Z = residual

Special type of election?

- ☐ 1 = Sonotone    ☐ 2 = Globe    ☐ 3 = Sonotone & Globe    ☐ 4 = craft severance
- ☐ 5 = sever department    ☐ 6 = sever other    ☐ 7 = ZIA    ☐ 8 = other

Drafted by Homero Tristan

Reviewing Supervisor Arly Eggertsen

Number of employees in unit 84

Date case assigned October 14, 1999

Date request for review due November 5, 1999

Date last brief timely received October 19, 1999

REQUIRED ATTACHMENTS: None    entered in CHIPS computer by: \_\_\_\_\_  
(operator's initials)

